

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELEON D. TATE,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 237039

Wayne Circuit Court

LC No. 99-012470-01

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony-murder, MCL 750.316(1)(b), and sentenced to life imprisonment. He appeals as of right. We affirm.

I. Defendant's Statement

Defendant moved to suppress a statement he allegedly gave to homicide investigator Gregory Edwards on the grounds that the police disregarded his invocation of his right to counsel and that the statement was coerced through threats and physical abuse. At a hearing held pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), defendant gave testimony in support of his claim that the statement was not given voluntarily, but he also testified that the typewritten statement that was being offered by the prosecution was not the statement he signed. The trial court refused to make findings of fact on the question of voluntariness, concluding that questions related to the authenticity of an allegedly fabricated statement are properly left to the jury. Defendant raises two issues pertaining to the court's ruling. First, he argues that the court erred by refusing to make findings on the question of voluntariness. Second, he argues that trial court should have suppressed the statement because the police refused to stop the interview or allow him to call an attorney after he asserted his right to counsel.

In *People v Spivey*, 109 Mich App 36, 37-38; 310 NW2d 807 (1981), this Court distinguished between a claim that a defendant's self-incriminating statement was given involuntarily, and a claim that the police fabricated the statement. This Court stated:

We agree with the trial court's conclusion that no evidentiary hearing was necessary. The purpose of the *Walker* hearing is to prevent prejudice to the defendant which may occur where a defendant has given inculpatory statements

to the police which are considered legally inadmissible due to the coercive circumstances surrounding the confession. *Walker* represents an exception to the general rule that fact questions are properly for the jury's consideration. Other factors relating to the confession, such as credibility, truthfulness and whether the statement had been made at all, remain for the determination of the trier of fact. [*Id.* at 37.]

However, in *People v Weatherspoon*, 171 Mich App 549, 554-555; 431 NW2d 75 (1988), and *People v Neal*, 182 Mich App 368, 370-371; 451 NW2d 639 (1990), this Court distinguished the situation where a defendant claims that the police fabricated a self-incriminating statement, but coerced him to sign it or instructed him to sign it while disregarding his assertion of his right to seek counsel. Although the panels in *Neal* and *Weatherspoon* disagreed as to the proper procedure to be followed in this situation, they agreed that the trial court must hold a *Walker* hearing and make findings of fact with regard to a defendant's allegation that he was forced to sign a statement in violation of his rights. The question of the authenticity of the statement, however, would still be left to the jury. See *Neal*, *supra* at 372; *Weatherspoon*, *supra* at 555.

Here, defendant did not make allegations of a fabricated statement with a forced signature. Rather, he claimed that he was coerced into making a statement in violation of his constitutional rights, but that the prosecution was attempting to introduce a *different* statement. Defendant did not testify at the *Walker* hearing that the typewritten statement introduced by the prosecutor was the same statement he allegedly gave involuntarily. Accordingly, whatever allegations defendant made regarding involuntariness and unconstitutional tactics were irrelevant to the statement. The trial court properly determined that, under these circumstances, it was not required to make findings on the issue of voluntariness, because the jury would resolve the questions pertaining to the statement's authenticity and credibility. The statement was therefore admissible, regardless of which witness was more credible as to defendant's allegations that the police coerced him to speak or that they ignored his invocation of his right to counsel.

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to argue that the trial court should have made factual findings at the conclusion of the *Walker* hearing. This argument lacks both factual and legal merit. Defense counsel adequately presented defendant's position when she urged the trial court to find that the statement was involuntary. Furthermore, because findings were not warranted under the circumstances, an argument demanding findings would have been futile. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II. Sufficiency of the Evidence

Defendant also argues that the evidence was insufficient to support his felony murder conviction because the prosecution failed to prove that he had the requisite intent for armed robbery or the requisite malice for murder. We disagree.

When a defendant challenges the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether it warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich

392, 399; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222-223; 646 NW2d 875 (2002).

MCL 750.316(1)(b) provides that murder committed during the perpetration of a robbery or attempted robbery constitutes first-degree murder. In *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995), this Court held that the following elements are necessary to prove felony murder:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316.

In a factual context such as this case, when a defendant aids and abets a robbery, and a co-felon murders the victim, the jury may infer that the defendant had both the intent to assist in the commission of the underlying felony, and the requisite malice for murder, if the defendant willingly participated in the crime, knowing that his co-felon was armed. *Turner, supra* at 566-568, 572-573.

Here, defendant admitted in both his statement to the police and his trial testimony that he joined his cousin, Artemia Stewart, and two others in the robbery of a drug dealer at his drug house. Although he denied having knowledge that Stewart was armed, the jury reasonably could have disbelieved this claim, especially considering defendant's admission that drug dealers are often armed with weapons. Additionally, defendant admitted that he and the others would have beaten Stewart into resistance if he did not submit to their demands for money. The jury could have inferred from this evidence that defendant intentionally participated in a robbery, knowing that another robber was armed, and knowing that the group was prepared to inflict great bodily harm. Consequently, there was sufficient evidence to support defendant's felony murder conviction.

III. Prosecutorial Misconduct

Defendant also argues that he was denied a fair trial because of misconduct by the prosecutor during closing argument. Defendant objected to two of the remarks he now challenges on appeal, the reference to drug dealing and the allusion to other robberies committed by defendant and Stewart. These claims are therefore preserved for appellate review. However, defendant did not object to the alleged "public duty" remark, so this is an unpreserved claim that we review only for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Prosecutorial misconduct issues are reviewed on a case-by-case basis. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). This Court examines the pertinent portion of the record and reviews the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.* Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Here, we find that none of the allegedly improper remarks deprived defendant of a fair trial. The remark about someone being a drug dealer clearly referred to Stewart, not to defendant. The remark cannot reasonably be understood to denigrate defendant's character. The "public duty" remark did not urge the jury to convict defendant regardless of the evidence; it asked the jury to find, from the evidence, that defendant was guilty and convict him as he deserved. Consequently, there was no plain error. The allusion to other robberies that defendant might have committed with Stewart also was drawn from the evidence and was relevant to the case. The prosecutor was pointing out that Stewart made a vague and ambiguous comment about "seeing what was up" on Mansfield, and that defendant understood that Stewart was referring to robbing a drug dealer. A key factual issue in this case was what defendant knew about Stewart's intent when he joined him in the robbery. The prosecutor was inferring from the evidence that defendant understood exactly what Stewart had in mind; therefore, the remark was relevant to the evidence introduced at trial. *Rodriguez, supra* at 30. Accordingly, defendant is not entitled to relief on the basis of prosecutorial misconduct.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly